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IN THE

Supreme Court of the United States

October Term — 1962

No. [redacted] 130

MATHIASEN TANKER INDUSTRIES, INCORPORATED

Petitioner

versus

ROBERT LEE MASON

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Harry E. McCoy
Charles R. Dalton, Jr.,
Counsel for Petitioner

SEAWELL, McCOY, WINSTON & DALTON
936 Wainwright Building
Norfolk 10, Virginia

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INTRODUCTION

This Petition for Writ of Certiorari to the Court of Appeals for the Fourth Circuit, filed by Mathiasen Tanker Industries, Incorporated, presents a single question of law which has never been considered by this Court, but which should be answered in order that there might be a clear and definitive statement of the rights and liabilities of *all* litigants (both plaintiff and defendant) to a jury trial in Jones Act litigation.

This Court has ruled in numerous previous cases that a seaman in a Jones Act case (or the employee in a Federal Employers Liability Act case) is entitled to a jury determination of the shipowner's (or employer's) negligence if there is any evidence, even the slightest, from which an inference of negligence can be made.

However, the converse of that ruling, (viz., the right of the shipowner to a jury determination of the seaman's contributory negligence if there is any evidence, even the slightest, from which an inference of contributory negligence can be made), has never been considered. Thus the question presented in this petition is one of first impression for the Court.

REFERENCE TO PROCEEDINGS BELOW

The divided opinions of the Court of Appeals for the Fourth Circuit are reported at 298 F2d 28. Likewise, they are printed in the Appendix to this Petition with the Majority Opinion by Circuit Judge Boreman at Page 2A and the Dissenting Opinion by Circuit Judge Haynsworth at Page 12A.

There was no written opinion in the District Court for the Eastern District of Virginia, Norfolk Division. The District Court's Judgment Order is printed at Pages 16A in the Appendix hereto.

Actual trial of this case consumed five (5) days after which the jury was requested to return a special verdict in which it answered five specific questions. In answer to question number three the jury found the seaman-plaintiff guilty of contributory negligence. The Fourth

Circuit has ruled that the jury should not have considered that question and has reversed the case for re-trial solely on the question of damages.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28 U. S. C. 1254 (1).

A Judgment of $2,000.00 was entered in favor of the plaintiff-seaman in the District Court on November 16, 1960. Thereafter the plaintiff appealed and the Court of Appeals for the Fourth Circuit heard oral argument in the case on April 12, 1961, but did not render its decision until January 3, 1962, approximately nine months later. A Petition for Rehearing was then filed in the Fourth Circuit on February 2, 1962, and was denied by Order entered in that Court on March 22, 1962.

QUESTION PRESENTED

DOES THE SHIPOWNER IN A JONES ACT CASE HAVE AN EQUAL RIGHT WITH THE SEAMAN TO A JURY DETERMINATION OF CAUSATION, NEGLIGENCE, CONTRIBUTORY NEGLIGENCE AND DAMAGES IN A SINGLE TRIAL?

STATUTES INVOLVED

The principal statute involved is 46 U. S. C. Section 688, known as the Jones Act (Appendix 20A) which simply incorporates the provisions of 45 U. S. C. 51 et seq. (known as the Federal Employer's Liability Act or F. E. L. A.), thus making the F. E. L. A. applicable to shipowners and merchant seamen.

STATEMENT OF THE CASE

The basis of original jurisdiction in the Dictrict Court for the Eastern District of Virginia was the Jones Act, 46 U. S. C. 688, et seq. The plaintiff, Robert Lee Mason, was a merchant seaman who was employed as an Oiler on the American Tanker MISSION CAPISTRANO. This ship is owned by the United States Navy but is operated with civilian personnel by Mathiasen Tanker Industries, Incorporated, pursuant to contract.

As an Oiler, Robert Lee Mason was of course employed in the engineroom force and thus in this case the factual evidence relates in large measure to a proper description and understanding of the physical appearance and layout of the space or compartments occupied by the engine of the ship.

Being a tanker, the engine spaces of the USNS MISSION CAPISTRANO are located in the stern of the vessel. In the immediate after end, is the fireroom where the ship's boilers are located. It is here that the Fireman Water Tender stands watch, tending the ship's boilers. Immediately forward of the fireroom is the ship's main engineroom, there being a water-tight bulkhead between the fireroom and the engineroom with access being obtained via a water-tight door opening on the main floor level. The main propulsion machinery and auxiliaries are located in the main engineroom area. At the extreme forward end of the main engineroom (on the main floor level) there is a control board from which the ship's engines and speed are controlled and regulated.

In both the fireroom and the engineroom there are many levels or gratings to which the crew may ascend or descend from the main floor or main deck level.

The blowers (which are essential to the firing and operation of the ship's boilers) are located on a "Blower Platform" which is three (3) levels or three (3) stories or three (3) decks above the main floor of the ship's fireroom. The area where the blowers are located is known as the fidley and is the uppermost part or very top of the fireroom. Consequently, the temperature in the fidley, being on the top of the ship's boilers, becomes very hot.

The ship's evaporators (which are essential for the conversion of seawater to fresh water) are located on the "Evaporator Flat" which is one level below the main floor or deck of the engineroom. Access to the evaporator flat is via an inclined ladder, (with handrails) extending from the forward part of the main engineroom down to that level.

Consequently, in order to go from the blower platform in the ship's fidley to the evaporator flat, it is necessary to descend a steeply inclined steel ladder (with handrails) a distance of nine (9) feet six (6) inches from the top of the fidley to the cabin deck level; descend a second steeply inclined steel ladder (with handrails) a distance of eight (8) feet from the cabin deck level to the *ship's* main deck level and to descend a third steeply inclined steel ladder (with handrails) from the ship's main deck level, an additional fifteen (15) feet nine (9) inches to the main floor of the fireroom. Thereafter it is necessary to walk through the fireroom, cross through the water tight door opening in the water-tight bulkhead between

the fireroom and the engineroom and then walk forward along the main deck or floor of the engineroom to the fourth steeply inclined steel ladder (with handrails) which leads from the forward part of the main engineroom down to the evaporator flat. (Pages 53-55 Appendix, Shipowner's Brief in Fourth Circuit).

Thus the total distance from the blower platform to the head of the ladder leading from the main engineroom to the evaporator flat is one hundred forty-five (145) feet and extends over three (3) steeply inclined ladders, several steel gratings, the steel plates of the fireroom, the water-tight door opening and the steel plates of the engineroom. (Page 55, Appendix Shipowner's Brief, Supra).

Robert Lee Mason was assigned duty as Oiler on the 12:00 to 4:00 watch on which Third Assistant Engineer Leon A. Roy was the watch officer and Henry Clark was the Fireman Water Tender. About 2:00 p. m. on September 28, 1958, while the ship was at sea, Third Assistant Engineer Roy and Mason were standing at the watch officer's desk in the forward part of the ship's engine room. This desk is nearby the main engine control board. The Third Assistant Engineer decided to make his 2:00 o'clock rounds and left Mason in the engineroom at the ship's controls. Thereafter Roy descended to the evaporator flat via the ladder in the forward part of the engineroom, inspected the machinery on the evaporator flat and then descended to the lower flat which is in the very bottom of the ship, two (2) levels below the floor of the main engine room. He completed his rounds in the very bottom of the ship and within 8 to 10 minutes started back up to the main engineroom by retracing

his route. As he ascended from the lower flat or bottom of the ship to the evaporator flat, the Third Assistant Engineer found Robert Lee Mason sprawled in an unconscious state on the deck of the evaporator flat. (Pages 56-64, Appendix Shipowner's Brief, Supra). First aid was called and Mason was given treatment, being removed first to the ship's hospital and then after radio contact with shoreside facilities, a Coast Guard launch met the vessel about four o'clock that afternoon and removed Mason to the United States Public Health Service Hospital at Charleston, South Carolina.

There were no eye witnesses to describe what happened to Robert Lee Mason or to explain why he was found unconscious at the foot of the ladder on the ship's evaporator flat. In fact, there could be no eye witnesses because the officer of the watch was down in the very bottom of the ship, the Fireman Water Tender was in the ship's fireroom and Mason himself had been left at the ship's controls approximately 8 to 10 minutes before he was found.

There was ample testimony by Merrill E. Cassell, an expert witness called by the plaintiff, (Pages 8-11, Appendix, Shipowner's Brief, Supra) that an experienced and qualified Oiler will never leave the engine controls in the main engineroom unattended while the Watch Engineer is making his rounds.

Mason did not deny that he had been left at the ship's controls by Third Assistant Engineer Roy, but on the other hand testified that he had left the main engineroom around 2:00 o'clock to make his own round oiling various pieces of machinery. This duty required that he

go up to the blower platform to oil the ship's blowers. He presented considerable evidence (which was denied and contradicted incidently) that there was considerable oil spilling from the base of the blowers onto the deck where the blowers are mounted three (3) levels above the ships boilers and that he had to track through this oil at least once every hour. In fact, Mason testified that so much oil dripped out on the deck that it accumulated a depth of one and a half to two inches which simply sloshed around on the deck at all times. (Page 21, Appenedix, Shipowner's Brief, Supra). This means that there would have had to have been between 50 and 100 gallons of oil present at all times. (Page 56, Appendix, Shipowner's Brief, Supra). Mason further testified that he had so much oil on his shoes that they were slippery as banana peels. (Transcript Page 179, Line 12 through 23, App. 20A.) Nevertheless, First Assistant Engineer Webber, who was called to the scene of the accident and who removed Mason's shoes testified that there was no oil, grease or any other foreign substance on those shoes. (Deposition of Lewis H. Webber, Page 11, Line 12 through Page 12, Line 12 App. 21A). Mason's clothing and personal effects, including his shoes were inventoried and sent ashore with him. The inventory was introduced as "Gregory Deposition Exhibit No. 1". Mason did not produce the shoes at the trial or offer any evidence to explain why they were not produced.

Mason contended that he descended in safety the three (3) steeply inclined ladders from the blower platform to the ship's fireroom, walked through the fireroom, crossed through the door in the water-tight bulkhead, walked forward through the engineroom and approached the head of the ladder leading to the evaporator flat and

after he grasped the rails of that ladder, he slipped (due to his oily shoes which were slippery as banana peels) and fell head first down to the evaporator flat.

All of this had occurred in the 8 to 10 minutes after Third Assistant Engineer Roy left Mason, an experienced Oiler, at the ship's controls to answer any orders or bells which may have been sent down from the ship's bridge. Thus the ship's engines were unattended for that short period of time.

During the trial the plaintiff called Dr. Robert Thrasher as a witness and through him introduced evidence, (Pages 11 through 21, Appendix, Shipowner's Brief, Supra), that Mason had been suffering from "chronic anxiety reaction" just a few months prior to his injury and that drugs known as Serpasil and Belbarb had been prescribed for him. Thereafter the plaintiff introduced the very drugs themselves which had been found in Mason's personal effects at the time Mason was removed from the ship. These drugs are Plaintiff's Exhibits Nos. 23 and 24 and were introduced as follows:

Pages 15-16, Appendix, Shipowner's Brief in Fourth Circuit:

"Mr. Kelsey: (Plaintiff's Attorney): If Your Honor please, these will be introduced in evidence on proof by Mr. Mason that they were given him by the Marine Hospital.

The Court: If you want to, for the purpose of the record, you can put them in now.

Mr. Kelsey: I will put them in right now. Also, I will put in a piece of paper with writings on

it which Mr. Mason will testify—in fact, there is a notation on his medical record that he inquired as to what these prescriptions were and they gave him the piece of paper with "Belbarb and serpasil."

The Court: Let the bottles of pills be marked Plaintiff's Exhibits 23 and 24 and the so-called slip, or whatever it is—a prescription blank—be Plaintiff's Exhibit No. 25.

(The articles mentioned were marked Plantiff's Exhibits 23, 24 and 25, respectively, and filed in evidence.)

Dr. Thrasher then testified that these drugs had toxic and side effects, including dizziness, in some people:

Page 18, Appendix Shipowner's Brief, Supra:

Q. (By Mr. McCoy): (Defense Counsel) Now, Doctor, these drugs have certain toxic effects, don't they?

A. Almost any drugs can have a toxic effect. These particular drugs may, in certain individuals. It depends on the dosage level, it depends on the particular reaction of the person that is taking the medicine. One person may have a tremendous side reaction, like that from penicillin, for example, and another person have none. Any drug can have a side reaction and these drugs do have side reactions in some people.

Q. Among the toxic effects of this drug reserpin or serpasil, we find headache, dizziness, nausea, and anorexia, don't we?

A. That is correct; they may have.

Thereafter Mason himself assumed the witness stand and under direct examination by his own attorney testified that he had suffered attacks of vertigo or dizzy spells while working on other ships.

Page 23-24, Appendix, Shipowner's Supra:

By Mr. Kelsey:

Q. Having been afflicted with what was mentioned yesterday as being vertigo—I presume that means dizzy spells—have you had any history of being afflicted with dizzy spells?

A. Well, I had on ships where I have been knocked out with steam or heat, got tired and laid down on the deck.

Q. What ship or ships are you referring to?

A. Well, I have been on about fifty or seventy-five different ships and I can't—in my mind, I just can't say.

Q. Well, how many times?

A. I will say two or three, maybe four.

Page 40-41, Appendix, Shipowner's Brief Supra:

By Mr. McCoy:

Q. Now, prior to September 29, 1958, had you ever suffered any fainting spells while on any other ship?

Mr. Kelsey: If Your Honor please, I would like to make this objection and statement to the

Court and would like to ask the Court to instruct the jury in regard thereto. We do not object to any so-called fainting spells or previous incidents if they have anything to do with this case, but unless counsel for the defendant introduces proof—and the burden is on him to do so—that they had anything to do with this case, I submit that no evidence should be introduced unless it is connected up. Now, we do not object to anything which might have some connection, because the man, in 1945, might have become faint from overworking or something. We do not object to this examination if Your Honor will instruct the jury that such fainting spells, if they occurred, must be connected to this injury, if Your Honor please, to have any probative value.

The Court: Well, you asked him on direct examination whether he had had any and Mr. McCoy is asking him whether he had had any, and if you asked the question, then I think Mr. McCoy has a right to ask that question.

Mr. Kelsey: I agree.

As there were no eye-witnesses and Mason was the only person to testify directly, his testimony was subject to very close scrutiny throughout the trial. His credibility was successfully impeached on at least five different occasions by his prior sworn testimony given in a discovery deposition or by exhibits in evidence. [(1) In discovery he testified his sea experience had been mostly on deck whereas at trial he stated it had been in the engine-room; (2) in discovery he said he never previously fainted on a ship whereas at trial he volunteered the opposite; (3) at trial he said he had not fainted on the S. S. AFRICAN RAINBOW but he identified his own signature to the letter he said he had presented to the U. S. P. H. S. Hospital at Norfolk showing that he had been

found unconscious in the engineroom of the S. S. AFRICAN RAINBOW just ten (10) months before his injury in this case; (4) in discovery he said he did not know if there had been any angle-irons around the base of the blowers, but at trial he described such angle-irons in detail; (5) he identified his signature to his pre-employment physical questionnaire on which he had answered that he had not been under a doctor's care or treatment within five years prior to his employment]. Also, evidence was introduced that he had been convicted of a felony.

At the conclusion of all evidence and argument and after the Court's charge, the jury was asked to return a special verdict in which it answered five questions as follows.

1. Were the defendant, its officers or crew members (other than plaintiff) guilty of any negligence which was a proximate cause of the accident and injuries sustained by plaintiff on September 29, 1958?

   Answered: Yes.

2. Was the vessel MISSION CAPISTRANO unseaworthy as defined in the charge of the Court and was such unseaworthiness a proximate cause of the accident and injuries sustained by plaintiff on September 29, 1958?

   Answered: Yes.

3. Was the plaintiff guilty of any contributory negligence which was a contributing proximate cause of the accident and injuries sustained by plaintiff on September 29, 1958?

   Answered: Yes.

4. On the claim for damages, including any claim for loss of wages, if you conclude that plaintiff is entitled to recover, what amount is the plaintiff entitled to recover?

   Answered: $2,000.00.

5. On the claim for maintenance, on what date did the plaintiff obtain his maximum recovery following his injuries on September 29, 1958, as defined in the charge of the Court?

   Answered: December 24, 1958.

After the District Court's Judgment was entered, Robert Lee Mason appealed to the Fourth Circuit. However, he did not assign any specific error or grounds for his appeal. In his brief, Mason raised only three (3) issues on his appeal. They were:

1. That the District Court had erred in admitting evidence of Mason's prior criminal conviction for a felony.

2. The District Court erred in admitting evidence of prior fainting spells in the engine-room on other ships and admitting evidence of the presence of medicines (bottles of pills) found in Mason's personal effects.

3. Mason asked for a new trial solely on the issue of damages because of the error committed in the first two issues.

As a matter of good faith in performing its moral and ethical obligation not to present a frivolous appeal and realizing that there was adequate conflicting evidence, both direct and circumstantial, to support the jury's verdict, the shipowner did not appeal.

In the Majority Opinion, the Fourth Circuit found that the District Court properly admitted the evidence of the prior felony conviction. Likewise, the Fourth Circuit ruled that the evidence of prior fainting spells and the presence of medicines was properly admitted because it was introduced by the plaintiff himself. However, having found that there had been no error in the two basic issues Mason raised on appeal, the Fourth Circuit then went off on its own initiative and in the Majority Opinion decided that there was no direct evidence from which the jury could make an inference of contributory negligence or causation.

Having thus re-weighed the evidence and substituted its own inferences and conclusions for those of the trial jury, the Majority Opinion then remanded the case to the District Court for re-trial solely on the question of damages.

The Dissenting Opinion, (being in agreement with the action of the District Judge) finds that there was evidence from which a jury could make permissible inferences of contributory negligence and causation and therefore these issues had been properly submitted to the trial jury.

It is from the Majority Opinion and action of the Fourth Circuit in denying the defendant ship-operator a right to a jury determination of causation and of the plaintiff's own contributory negligence that this Petition for Certiorari is filed.

ARGUMENT

This Court's decisions in Federal Employers Liability Act. (F. E. L. A.) cases are equally applicable to Jones Act litigation, *Schulz vs. Pennsylvania R. R. Co.*, (1956) 350 U. S. 523; 76 S. Ct. 608; 100 L. Ed. 668, *Ferguson vs. Moore-McCormack Lines, Inc.*, (1957) 352 U. S. 521; 77 S. Ct. 457; 1 L. Ed. (2d) 511.

Thus in a Jones Act case it is not the function of an appellate court to search the record for conflicting circumstantial evidence in order to take the case away from the jury, because the jury, not the court, is the fact-finding body and appellate courts are not free to re-weigh the evidence or set aside the jury verdict merely because the appellate court can draw different inferences and conclusions or because the appellate court feels that other results are more reasonable, *Tennant vs. Peoria & P. U. R. R. Co.*, (1944) 351 U. S. 29; 64 S. Ct. 409; 88 L. Ed. 520.

The right to a jury trial is "part and parcel of the Employers' Liability Act" which the Jones Act makes applicable to merchant seamen and ship-operators. Therefore the issues of negligence in a Jones Act case call for the exercise of common sense and sound judgment *under the circumstances of the particular case and are questions for the jury to determine, Schulz vs. Pennsylvania R. R. Co.*, (1956) (Supra).

In F. E. L. A. and Jones Act litigation the test of a jury case is simply whether negligence played *any* part, *even the slightest,* in producing the injury and it does not matter that the jury may attribute the result to other

causes, including contributory negligence. "The decisions of the Supreme Court since 1939 teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ." Therefore certiorari will be granted when lower federal courts deprive LITIGANTS of their right to a jury determination, *Rogers vs. Missouri Pacific R. R. Co.,* (1957) 352 U. S. 500; 77 S. Ct. 443; 1 L. Ed. (2d) 493.

Appellate "courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function", *Ferguson vs. Moore-McCormack Lines, Inc.,* (1957) (Supra).

In Jones Act cases the jury (not the Court) has the exclusive power to draw inferences of causation even where there is a complete failure of evidence to connect the result with the alleged negligence. The members of the jury (not the witnesses or the Court) are sworn to make a legal determination of the question of causation and *the jury is entitled to take all the circumstances of the injury into consideration, Sentilles vs. Inter-Caribbean Shipping Corp.,* (1959), 361 U. S. 107; 80 S. Ct. 173.

Moreover in Jones Act litigation, DIRECT evidence is NOT required but CIRCUMSTANTIAL evidence is sufficient to raise a jury question, *Michalic vs. Cleveland Tankers, Inc.,* (1960) 364 U. S. 325; 81 S. Ct. 6.

Furthermore, such evidence and testimony, direct or circumstantial, as is produced by the plaintiff himself,

may be considered by the jury on the issue of the plaintiff's own contributory negligence, *Miller vs. Union Pacific Ry. Co.*, (1933) 290 U. S. 237; 54 S. Ct. 172.

In Jones Act litigation the provisions of the Seventh Amendment are brought into play and an appellate court's search for one possible view of the case which will make the jury's finding inconsistent, results in a collision with the Seventh Amendment which provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States; than according to the rules of the common law", *Atlantic & Gulf Stevedores, Inc., vs. Ellerman Lines, Ltd.*, (April 2, 1962) ..... U. S. .....; 82 S. Ct. 780.

The substantive rights or defenses arising under the F. E. L. A. (Jones Act) cannot be lessened or destroyed by a rule of practice. The evidence relating to injury, causation and damages is generally so interwoven that in order to ascertain or determine a fair verdict the *whole* case should be tried at one time before one judge and one jury instead of "splitting it up" between different trials with different judges and different juries, *Norfolk Southern R. Co. vs. Ferebee*, (1947) 238 U. S. 269; 35 St. Ct. 781.

Therefore, the benefit and privilege of a jury decision granted a plaintiff under the Jones Act, even when based on the slightest shred of circumstantial evidence from which an inference of negligence or causation may be drawn, carries with it the concomitant responsibility of having that same jury render a verdict on the whole case, including liability, causation, damages and contributory negligence, even when based on the slightest shred

of circumstantial evidence from which an inference of the plaintiff's own negligence may be drawn.

If the law were otherwise—if the shipowner-employer were not entitled to the same jury determination that has been conferred on the seaman-employee in Jones Act litigation—if the shipowner were not entitled to have the whole case tried before one judge and one jury (instead of partial re-trials which are not to be commended), then the defendant would indeed be denied the due process of law guaranteed under the Fifth Amendment. The very essence of due-process is the "American ideal of fairness" and fair play, (Galvan vs. Press, (1954), 347 U. S. 522; 74 S. Ct. 737; 98 L. Ed. 911). Due process of law requires essential fairness and justice in judicial proceedings, (U. S. ex rel Marelia vs. Burke (D. C. Pa.—1951) 101 F. Supp. 615, affirmed by 3rd Cir. (1952) at 197 F (2d) 856; cert. den. Marelia vs. Burke (1952), 344 U. S. 868; 73 S. Ct. 110; 97 L. Ed. 673). Therefore due process is had when laws affect alike all persons similarly situated. (Vol. 16-A, C. J. S. 543, Constitutional Law No. 567), because there is administration of equal laws.

Therefore if this Court's decisions in *Tennant vs. Peoria & P. U. R. Co.*, (1944), in *Schulz vs. Penn. R. R. Co.*, (1956), in *Rogers vs. Missouri Pacific*, (1957), in *Ferguson vs. Moore-McCormack Lines, Inc.*, (1957) in *Sentilles vs. Inter-Caribbean Shipping Corp.*, (1959), in *Michalic vs. Cleveland Tankers, Inc.* (1960), and in *Atlantic & Gulf Stevedores, Inc., vs. Ellerman Lines, Ltd.*, (1962) are to have any meaning of fairness, fair play and justice in judicial proceedings, they must comport with the due process clauses of the Fifth Amendment and be equally applicable and affect alike all parties (i. e. both the plaintiff and the defendant). This we re-

spectfully submit is the intent and meaning expressed by Justice Brennan in *Rogers vs. Missouri Pacific* (supra) when he speaks of the rights of the LITIGANTS (meaning both plaintiff and defendant) to a jury trial. We refer to Mr. Justice Brennan's language:

77 S. Ct. 443 at 451:

> "Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive LITIGANTS of their right to a jury determination."

Having considered the applicable provisions of law, we now turn to a careful and thorough reading of the Fourth Circuit's opinion which reveals that the majority decision is founded on the following excerpts:

FIRST:

> "We find no abuse of discretion in permitting defense counsel to attack the credibility of the plaintiff by inquiring about an earlier felony conviction. Certainly, the credibility of the plaintiff was very much in issue because there were no eye witnesses and he was presenting his own version of the accident." (App. 6A)

SECOND:

> "During the course of the trial in response to questions propounded by his own counsel, Mason testified that on several occasions, from ten months to many years earlier, he had fainted while on duty as oiler in a ship's engineroom. Mason explained the reason he had fainted on each occasion: Once he had influenza; on another occasion while his ship

was operating in the tropics he was overcome by the heat in the engineroom; a third fainting spell was caused by food poisoning; once he was 'lightheaded' because of the 'grippe'." (App. 7A).

THIRD:

"Plaintiff also introduced into evidence two small bottles of pills[2] which had been prescribed for him by the United States Public Health Service Hospital for a nervous condition six months prior to the accident and which were found in his locker aboard ship after the accident. Mason testified that he had not taken any of the pills for the past several months preceding the accident. There was no evidence to indicate that Mason was taking the pills or was subject to their effect in any way just prior to the accident." (App. 8A).

[2]The testimony revealed that the tranquilizer drugs in the pills are known as "Reserpine" and "Belbarb".

FOURTH:

"Here defendant had the burden to prove by a preponderance of the evidence Mason's contributory negligence." (App. 9A).

FIFTH:

"No direct evidence was introduced to meet this burden." (App. 9A).

SIXTH:

"It was, to some extent, apparent that the defendant, by insinuation, would have the jury infer that a fainting spell caused the plaintiff to fall." (App. 8A).

SEVENTH:

"It cannot be reasonably argued that the physical facts involved in the fall could be accepted

as evidence of Mason's failure to grasp the handrails or take other precautionary measures." (App. 9A).

EIGHTH:

It is a matter of common experience that a person can slip on a stairway, due to extremely slippery conditions, with such force that his hands would be loosened from the rail. No inference to the contrary could properly have been drawn by the jury from the evidence in this record." (App. 9A).

NINTH:

"We believe this was error which may have affected the amount of the verdict." (App. 10A).

TENTH:

"Plaintiff appeals from the jury's determination of damages, claiming that the $2,000 award is inadequate." (App. 4A).

ELEVENTH:

"We do not express any opinion on the adequacy of the award as found by the jury." (App. 4A).

TWELTH:

"The jury determined the issue of liability against the defendant and the court entered judgment thereon. The defendant has not appealed." (App. 4A).

THIRTEENTH:

". . . the defendant has not appealed from the adverse determination of the liability issue.' (App. 10A).

FOURTEENTH:

"Defendant's liability having been determined, we are of the opinion that the plaintiff is entitled to a new trial on the sole issue of damages." (App 11A).

The foregong excerpts quoted from the Fourth Circuit's opinion lead to the inescapable conclusion that the appellate court has re-weighed and re-evaluated the evidence and substituted its own inferences and conclusions for those of the jury. Examples of this are:

FIRST: The Fourth Circuit's criticism that the defendant shipowner had the burden to prove Mason's contributory negligence but failed to introduct any DIRECT evidence to meet that burden, simply ignors the applicable law and the evidence introduced by Mason himself and all the other circumstances of the case.

Mason introduced the evidence of his prior fainting spells while on duty as an oiler in a ship's engineroom. Likewise, it was Mason who introduced the evidence of his prior nervous condition and the fact that he had pills (drugs known as Resperine and Belbarb) which had been prescribed for his use just a few months before his injury. If Mason was not using these drugs, why was he carrying them and why did he voluntarily introduce them into evidence? These were part of the "circumstances of this particular case" for the jury to consider, *(Schulz* (supra)). The jury was entitled to know that these drugs are taken for mental disorders and have a side effect of dizziness and to take all these circumstances into consideration even if there was a complete failure of direct evidence to connect these drugs with the injury, *(Sentilles* (supra)).

Yet the Fourth Circuit says that the defendant-shipowner, *(who did not even introduce that evidence)*, may not have the advantage of the plaintiff's own testimony given on his direct examination and his other evidence!

This is indeed a novel and new rule of evidence which completely emasculates the elementary principle that a party is bound by his own testimony and evidence. By thus creating one standard of evidence for the plaintiff and a different standard for the defendant, the appellate court has denied the shipowner both its right to a jury determination and its right to equal protection as implied in the due process clause of the Fifth Amendment.

SECOND: The plaintiff appealed from the jury's award of $2000 contending it was inadequate. The Fourth Circuit stated at the outset that it expressed no opinion on the adequacy of that award. However, the Court of Appeals ruled that permitting the defendant to use and have the advantage of evidence and testimony introduced by the plaintiff himself was error which *may* have affected the *amount* of the verdict.

Obviously, the *amount* of the verdict is the same thing as the *adequacy* of the verdict. Thus we reach the real and underlying reason why the Fourth Circuit reversed the case for re-trial on damages only. That reason is that the Fourth Circuit simply felt the jury's verdict was inadequate. Thus, the Fourth Circuit has found a method to substitute the opinions of two of its judges for the verdict of the jury. In the language of Mr. Justice Brennan in the *Rogers* case (above), it is this type of narrow and niggardly construction by the lower federal and state courts which persistently deprives the LITIGANTS (both plaintiff and defendant) of their right to a jury determination.

THIRD: About 8 to 10 minutes prior to finding Mason on the evaporator flat, Third Ass't Engineer Roy had left

Mason at the engine controls while Roy made his rounds in the bowels of the ship, (Roy Deposition Page 23, Line 23 through Page 25, Line 18). As there were only three men on watch, (one of whom ,was in the fireroom) Mason, an experienced Oiler was expected to stay at the ship's engine controls until Roy's return, (Testimony of Merrill Edward Cassell, an expert witness called to testify by Mason, Pages 63, 64, 65 and 66 of the trial Transcript, App. 22-24A). Nevertheless, Mason obviously left the ship's engine controls completely unattended; otherwise Mason would not have been able to climb to the blower platform, oil the blowers, descend to the fireroom, pass through into the engineroom, walk forward to the steps leading to the evaporator flat and fall down those steps where he was found by Third Ass't Roy as Roy returned from his rounds 8 to 10 minutes later.

Certainly this is evidence which created an inference for the jury to conclude that Mason had left the engine control unattended and was going about his other duties in obvious haste and without proper care for his own safety.

Thus the jury was well justified in inferring that such action amounted to a lack of prudence and reasonable care and at least contributed to the accident.

To paraphrase the language of the *Tennant* case (supra), the very essence of the jury's function was to select from among conflicting inferences and conclusions that which it considered most reasonable. The jury's decision that Mason was guilty of contributory negligence cannot be ignored. The Fourth Circuit was not free to reweigh that evidence merely because two of the three

judges disagreed with the trial jury and District Judge and felt that other results were more reasonable.

FOURTH: Mason's predominant injuries were located about his face. Yet he physically demonstrated to the jury how his foot slipped from under him before he descended the ladder and caused him to fall, (Transcript Page 189, 190); this physicial demonstration was not expressed in words, of course, but from it the jury could well have concluded that had Mason fallen as he demonstrated, then he would have had predominant injuries elsewhere than about his face. Thus, the location of Mason's predominant injuries, considered in light of his own description of the fall, created strong circumstantial evidence that the accident was not caused solely by oily shoes but was at least contributed to by Mason's inattention and lack of due care in starting to descend the stairway.

Therefore, when the Fourth Circuit says:

> "It cannot be reasonably argued that the physical facts involved in the fall could be accepted as evidence of Mason's failure to grasp the handrails or take other precautionary measures. It is a matter of common experience that a person can slip on a stairway, due to extremely slippery conditions, with such force that his hands would be loosened from the rail. No inference to the contrary could properly have been drawn by the jury from the evidence in this record."

it is merely substituting its own inferences and conclusions for those made by the jury. In the language of the *Schulz* case (supra), these issues (inferences and conclusions) are questions for the jury to determine and call for the

exercise of common sense and sound judgment *under the circumstances of the particular case.*

FIFTH: There is not a single shred of evidence in the record that there was any oil on the deck of the engine room which caused Mason to slip and fall. Likewise there is absolutely no evidence or even suggestion in the record that the stairway itself was in an extremely slippery condition as indicated in the Fourth Circuit's opinion. The evidence of 1st Assistant Engineer Webber was that there was no oil or grease on Mason's shoes when Webber removed them immediately after the accident (App. 22A). Therefore it was solely within the jury's function to infer whether or not Mason's fall was caused at least in part by his own inattention and lack of prudence or to take other precautionary measures for his own safety. This is particularly true where the plaintiff's credibility was under very strong and effective attack and when Mason, (whose inventory of clothes and personal effects, including the shoes was sent ashore with him), did not produce or explain the absence of the shoes at trial.

As suggested in the *Ferguson* case (supra), the Fourth Circuit should not have assumed that the jury fell short of a fair performance of its constitutional function.

SIXTH: Mason says that over a period of time his shoes had become so saturated with oil that they were as slippery as banana peelings, but as pointed out above, he did not produce or explain the absence of those shoes at trial. However, he admitted that immediately before his accident he had descended three (3) steeply inclined steel stairways or ladders from the blower platform to the floor of the fireroom, a vertical distance of 45 or 50 feet; he had then walked horizontally another 25 or 30 feet

through the fireroom, stepped into the engineroom and walked along on the steel deck; all of the foregoing was without any difficulty or trouble at all, because Mason had wiped his shoes off and had held on tightly to the three (3) vertical or steeply-inclined ladders, (Transcript Page 224, Line 9 through Page 231, Line). At the same time he did not deny that 3rd Assistant Engineer Roy had left him alone at the ship's engine controls in the main engineroom just 8 to 10 minutes before his injury. In view of the physical features and distance involved, Mason would have been compelled to have hurried — almost run — to have made the trip from the engine controls up to the blowerflat, oiled the blowers and returned.

The jury was certainly entitled to draw the inference from Mason's foregoing testimony that his own inattention and lack of prudence was at least a contributing cause to his accident, particularly in view of the ease and lack of difficulty encounted in descending the three similar ladders from the blower platform.

As this Court held in the *Sentilles* case (supra), the jury was entitled to take *all* the circumstances, including the physical appearance and dimensions into consideration. Therefore the jury's power to draw an inference of the plaintiff's own contributory negligence was not impaired by the failure of any witness to testify that such contributory negligence was in fact a cause of the injury.

SUMMARY

The foregoing facts, reviewed under the principles established in eight prior decisions of this Court, demonstrate clearly that the Fourth Circuit has emasculated the basic rule of evidence that a party is bound by his own

testimony and evidence he voluntarily introduces; that the Fourth Circuit has ignored this Court's decision in *Michalic vs. Cleveland Tankers, Inc.*, (supra) that DIRECT evidence is *not* required; that the Fourth Circuit has refused to adhere to this Court's decisions in *Schulz vs. Pennsylvania R. R. Co.*, (supra) that the issues in a Jones Act case call for the exercise of common sense and sound judgment under the circumstances of the particular case and are questions for the jury to determine and in *Sentilles vs. Inter-Caribbean Shipping Corp.*, (supra) that the jury is entitled to take *all* the circumstances of the injury into consideration even where there is a complete failure of direct evidence to connect the result with the alleged (contributory) negligence; that the Fourth Circuit, contrary to this Court's decision in *Ferguson vs. Moore-McCormack Lines, Inc.*, (supra) should not have assumed that in determining the questions presented to it the trial jury fell short of a fair performance of its constitutional function; that the Fourth Circuit has completely circumvented the mandate of this Court as expressed in *Tennant vs. Peoria & P. U. R. R. Co.*, (supra) and in *Rogers vs. Missouri Pacific R. R. Co.*, (supra) by re-weighing, re-evaluating the evidence and by substituting the inferences and conclusions of two of its three judges for those of the trial jury, thereby depriving the LITIGANTS, both plaintiff and defendant, of their right to a jury trial; that the Fourth Circuit has overlooked this Court's decision in *Miller vs. Union Pacific Ry. Co.*, (supra) that the evidence and testimony voluntarily produced by the plaintiff himself may be considered by the jury on the issue of the plaintiff's own contributory negligence; and finally, the Fourth Circuit has modified and changed the dictate of this Court in *Norfolk Southern Ry. Co. vs. Ferebee*, (supra) that partial re-

trials are *not* to be commended but in F. E. L. A. (Jones Act) cases the whole case as to causation, negligence, contributory negligence and damages should be tried at one time before one judge and one jury instead of "splitting it up" between different trials with different judges and juries.

CONCLUSION

By ignoring and emasculating the doctrine and mandate established by this Court's decisions in the eight cases cited above, the Fourth Circuit also violated the most recent pronouncement in *Atlantic & Gulf Stevedores, Inc., vs. Ellerman Lines Ltd.,* (supra) that in Jones Act litigation the Seventh Amendment is brought into play and therefore the Fourth Circuit's search for one possible view or result that was inconsistent with the jury's findings results in a collision with the Seventh Amendment.

These nine prior Supreme Court decisions, spanning the years of 1944 through 1962, define without equivocation that a seaman in a Jones Act case is entitled to a jury determination of the shipowner's negligence and causation, if there is any evidence, even the slightest, from which an inference of negligence or causation can be made.

Unless the shipowner is going to be denied the due process of law guaranteed in the Fifth Amendment, that shipowner is entitled to an equal application of these same nine decisions and therefore is entitled to a jury determination of the seaman's contributory negligence

and causation, if there is any evidence, even the slightest, from which an inference of contributory negligence or causation can be made. Thus —

THE SHIPOWNER IN A JONES ACT CASE HAS AN EQUAL RIGHT WITH THE SEAMAN TO A JURY DETERMINATION OF CAUSATION, NEGLIGENCE, CONTRIBUTORY NEGLIGENCE AND DAMAGES IN A SINGLE TRIAL.

As Mathiasen Tanker Industries, Inc., has been denied its "equal right" in this case, a Writ of Certiorari should be granted.

Mathiasen Tanker Industries, Inc.,

Respectfully submitted,

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